

Recommendations:

The following list was compiled from letters and emails from Task Force members or Tribes. The letters and one email containing recommendations can be found in the Appendices of this report.

1. *Conservation*

- a. Association of WA Cities - The Legislature should consider potential new conservation standards for water systems served by water rights accessed utilizing mitigation such as requiring WDOH certification that a municipal purveyor is in compliance with the WDOH water conservation statute and rule as a precondition to using the sequenced mitigation standard.
- b. WDFW - Washington State should seek ways to incentivize the reuse of wastewater where it is being discharged into the marine environment.
- c. Muckleshoot Indian Tribe - The Legislative Report should recommend that legislation be developed to strengthen conservation targets and goals among all customer sectors, especially high consumption users, require water providers to reduce leakage to below 5% (real water leakage reductions, not accounting errors), and make some or all of these measures mandatory. The 2023 session is likely too soon to develop this legislation but any future planning process must involve federally recognized Indian Tribes.

2. *Source Switch*

- a. Trout Unlimited would urge the Joint Task Force to support additional conversations led by the Department of Ecology (Ecology) on “source switches” to determine if there is a pathway to allow for broader use of these types of transfers. While we have heard from some cities that this option provides little relief, we believe this approach has the potential to offer an additional option for public water systems and others for approving transfers from surface water to ground water and potentially other sources like aquifer recharge. We are currently working with a city in Central WA who is looking to move their tributary diversions to wells downstream in an effort to enhance instream flows in the tributary and remove a diversion from the stream while allowing for ongoing use and growth for its water supply.
- b. Sierra Club - The Department of Ecology should help facilitate continued discussion among stakeholders on the subject of “source switch” to see if agreement can be reached on a streamlined approach for approving transfers from surface water to ground water.
- c. Muckleshoot Indian Tribe - The definition of this term [source switch] is needed. The comments here are related to changing a source from a surface water to groundwater. More discussion on this topic could be fruitful as long as instream flows rights are not impaired and WDFW, WDOE, and federally recognized Indian Tribes agree with the outcome.

3. *Impacts and impairment*

- a. WA Water Utilities Council and Association of WA Cities - The Legislature should clarify and codify two key holdings of Postema, as follows: (1) hydraulic continuity between groundwater and a surface water source that is either closed or is not meeting instream flows, is not, in and of itself impairment; (2) for Ecology to deny an application for groundwater where there is connection between groundwater and a surface water source that is either closed or not meeting flows, there must be an adverse effect on instream resources.
- b. Tulalip [Tribes] recommends leaving the definitions of impairment as they currently stand. Current laws, policies and rules encode protection of stream from further impairment by ground water withdrawals.

- c. Muckleshoot Indian Tribe - Any legislation to change the results and findings of the *Postema* Decision are opposed by the Tribe. The Legislature should not engage in furthering weakening of case law that protects minimum instream flows for salmon and threatens tribal treaty rights. The Supreme Court properly ruled that impairment was a factual question and disagreed that hydraulic continuity equates to impairment as the PCHB Court did and some Task Force members, and Ecology, have stated or implied. Also, the Court properly found that Ecology can use the best science available to determine impairment. Perhaps the Court should also have found that best professional judgement and common sense be used when evaluating model results – then discussions about “very small impacts shown on far away streams”, which are known to qualified professional MODFLOW modelers as “noise” or “not real” could have been averted.

4. *De minimis*

- a. WA Water Utilities Council - Establish a collaborative state-local program so that impacts that are either de minimis, not adverse, or that in combination with existing conditions or other applications could have cumulative adverse impacts, can be mitigated at the watershed or sub-watershed level. The Legislature supported use of public funds (Hirst decision fix in Sec. 304 in ESSB 6091) to enable rural growth, and support for water resource mitigation is essential for GMA’s primary purpose of enabling urban growth.
- b. WA Water Utilities Council and Association of WA Cities - The Legislature should also recognize, as other Western states have done, that certain de minimis or insignificant effects of groundwater appropriations do not constitute an impairment of regulatory instream flow water rights or stream/lake closures. The percentage of insignificance (or percentage of natural variation) should be established for each stream segment and lake based on existing levels rather than for each application, to prevent multiple cumulative impacts from exceeding the level of insignificance.
- c. The Tulalip Tribes find that stream flow and aquatic ecology are already impacted by over century of land use, water resources appropriations and alteration of the landscape. Water resource laws and policies are protecting the current and must altered status of stream flows and ecosystem health for the people of the State. Alteration of the regulatory system that governs protection and allocation of water resources acknowledges neither the impacts already enacted on the waters of the State nor the treaty reserved rights of Tribes.
- d. Muckleshoot Indian Tribe - Any weakening of the de minimis standard of impairment is also opposed; which should be of concern to any senior water right holder. Remember, the Foster Decision stated, “our State’s long-established ‘prior appropriation’ and ‘first in time, first in right’ approach to water law, ... does not permit any impairment, even a de minimis impairment, of a senior water right.”

5. *Mitigation and net ecological benefit*

- a. WA Water Utilities Council - The NEB process was successfully demonstrated in the Yelm Pilot Project that was approved but should be considered for simplification by the Legislature so that mitigation sequencing is more practically achievable.
- b. WA Water Utilities Council - Allow water right applicants to use mitigation sequencing, which is used in numerous other environmental permitting areas, that follows the accepted sequence of (a) avoiding impacts; (b) minimizing impacts; and then (c) compensating for impacts with both in-kind and out-of-kind mitigation.
- c. WA Water Utilities Council - Create a transparent technical review board of qualified members that can be used to review complicated water right applications and mitigation plans.

- d. Association of WA Cities - Recommend Legislature provide authority to Ecology to issue water rights decisions based on mitigation for expected impacts which should include out of time, out of place, and out of kind flexibility.
- e. Association of WA Cities - Recommend Legislature provide authority to Ecology to issue water rights decisions based on mitigation for expected impacts which should include out of time and out of place flexibility.
- f. Trout Unlimited agrees with WPUA's recommendation for establishing a state program to help with funding to support achievement of mitigation requirements for projects where public entities are mitigating or supplying water through public systems. Projects could include drought relief pumping storage and aquifer storage, as appropriate. The funding supported by the Streamflow Restoration Program has allowed for creativity and flexibility in developing projects that enhance flows and habitat in many basins in our state, and we need to expand the range of project approaches that would achieve those important outcomes.
- g. Mitigation for a water right should be in place and in time as confirmed in the Foster Decision. Tulalip Tribes can be inconvenienced by the rigorous requirement to mitigate; however, it is in the best interest of the environment and protection of the waters of the State to determine and mitigate water losses by reach. A net ecological benefit approach fails to address the concentration of an impact in one stream reach or geographic area and often does not produce water as mitigation.
- h. Muckleshoot Indian Tribe - These are complex and factual issues that should not be addressed at the Legislative level, but discussed among state resource agencies and federally-recognized tribes.

6. *Overriding Consideration of Public Interest*

- a. WA Water Utilities Council - The Legislature should adopt objective standards in the water code, not subjective tests like the OCPI exception that has proven too unwieldy to have any reliable function for either Ecology or water right applicants.
- b. WA Water Utilities Council - The Legislature should consider replacing the word "withdrawal" with "appropriation" in the final sentence of RCW 90.54.020(3)(a)). Per Foster v. Yelm, this would remove the Court's determination that OCPI only can be used for "temporary" withdrawals.
- c. Association of WA Cities - The Legislature should replace the word "withdrawal" with "appropriation" in the final sentence of RCW 90.54.020(3)(a)). Per Foster v. Yelm, this would remove the Court's determination that OCPI only can be used for "temporary" withdrawals. However, this should not be the only action the state takes to provide tools for approvable water rights applications.
- d. Trout Unlimited supports engaging in a thoughtful, collaborative effort to clarify and expanding the use of OCPI to allow for the implementation of permanent projects that can show enhancement of instream flows at critical times for fish while allowing for out-of-stream uses that might otherwise be prohibited.
- e. Tulalip [Tribes] sees no room for adjustment for the OCPI. The intention of the policy, which has been confirmed by the judiciary in multiple cases, is to provide a 'short term' and 'emergency' supply of water. Changing words in the policy from 'withdrawal' to 'appropriation' is not an appropriate approach to securing a water supply for any purpose of use.
- f. Sierra Club - Allowing Permanent Projects to Qualify for OCPI Exemption. The Foster court ruled that only temporary projects can qualify for OCPI. We support expanding the exemption to allow for permanent projects, such as siting of a hospital, to be considered. Having said that, we do not support expanding the OCPI exemption beyond that change.

- g. The [Muckleshoot Indian] Tribe believes that the Foster Court made the correct finding that OCPI is not an alternative to the traditional permitting process and that short term, temporary uses only should fall under that umbrella.

7. *Modeling*

- a. WA Water Utilities Council - Create objective standards for the creation and application of computer groundwater models, including limiting groundwater modeled impacts to areas within the watershed or Water Resource Inventory Area, and not basing permit decisions on impacts that are outside a model's margin of error.
- b. WA Water Utilities Council - The Legislature should consider directing Ecology to utilize simplified mathematical models rather than regional models for determining impairment where the applicant elects to use the Legislature's mitigation sequencing method and NEB determination. NEB determinations at the end of the sequencing process can provide the basin-wide protection that eliminates the need for rigorous computer modelling.
- c. Association of WA Cities - The Legislature should direct the Department of Ecology to undertake rulemaking to establish a process on how to determine the margin of error for hydrological models. Clarify and codify that modeled impacts within the error margin of models shall not be considered impairment.
- d. There was significant discussion at several of the Joint Task Force meetings on the lack of clarity, error thresholds and uncertainty of groundwater modeling and other mechanisms used to help with appropriate mitigation. Trout Unlimited would recommend that Ecology and the Department of Fish and Wildlife (WDFW) convene a group of technical experts to review existing information, objective standards and other techniques that could be used to help define what models are the best options. Once there are agreed upon standards for various WRIA's, we would encourage Ecology to pursue rulemaking to provide clarity to project proponents.
- e. Tulalip Tribes - This is a technical issue that likely cannot be solved thorough legislation, as each water resources model is tailored to a specific water appropriation. Models error is fairly well managed within the modeling process. Typically, models are set to estimate water resources impairments using first principles and if available, data taken from the location where a water right has been requested. Model error allows for a model user and other participants, governmental agencies, Tribes and stakeholders, to find a band of tolerance for 'unknowns'. Typically, these bands of unknowns are agreed to in advance and don't necessarily benefit the applicant over other stakeholders. The best way for Ecology to manage model error is to have their experts consult with applicants and other governments to ensure agreement. Simplified mathematical models will not address the specificity needed to make water resources management decisions.
- f. Sierra Club - Establishment of an Ecology Technical Advisory Committee to Review the Use of Hydrologic Models and other Mechanisms for Determining Appropriate Mitigation. Questions have been raised regarding the appropriate use of models to determine water mitigation. Ecology should convene a group of technical experts to review models currently in use for this purpose as well as to review other techniques that might be used to determine water mitigation. The group should then make recommendations to Ecology. Ecology should then develop guidance on this topic.
- g. Muckleshoot Indian Tribe - Perhaps a technical group or committee could discuss and clarify the use and uncertainties of models used in water right evaluations; however, in our experience with such processes, participants are heavily weighted toward the potential applicant with their consultants outnumbering neutral members, or resource protection

members. Also, consideration should be given to other methods of technical assessments for less complex situations. Of course, strong coordination with federally-recognized tribes must occur. The arguments that modeling is seriously flawed are misleading and sometimes untrue.

8. *Other*

- a. Tulalip Tribes - State Water Plan - While the conversations at the Joint Task Force have been very informative, we believe that taking a play out of the playbook model from California and other states that have built state-wide water plans would help to provide the clarity needed in Washington State. We believe that funding from the WA State legislature to support the creation of a state-wide water plan that includes the status and trends of Washington's water-dependent natural resources, water supplies, and agricultural, municipal and other domestic, and environmental water demands and considers a range of plausible future climate change scenarios.
- b. Many issues related to water supply, mitigation, instream flows, and water rights require local planning. Trout Unlimited would encourage local review boards set up to review mitigation plans including Tribes, WDFW, senior water right holders, and others to help facilitate development and implementation of these plans.
- c. WDFW - Resource managers should incorporate scientific insights about climate change impacts into decisions that have the potential to affect fish, wildlife, and the habitat they need to thrive.